No. 20822

In the

United States Court of Appeals For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA, a corporation,

Appellant,

v.

THOMAS J. THOMPSON,

Appellee.

Appeal from the United States District Court
for the District of Idaho
Southern Division

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW The Appellant, Insurance Company of North America, and petitions this Honorable Court for a rehearing in this cause and from the decision of this Court of August 4, 1967, upon the following grounds:

1. The opinion erroneously omits considering the evidence on, and omits Appellant's defenses as to, the effect of Appellee's pre-existing infirmities and disease in relation to the September 9th injuries. Thereby the Court erroneously assumes the September 9 accident created a covered loss and only considers the question of the sufficiency of the evidence of disabilities from the February 21 event. The latter issue of Appellant's liability for any loss resulting from medical treatment was improper, absent the requisite prior determination on Appellant's defense that coverage under the policy never came into existence in the first instance on September 9. It is submitted that, while Appellant admits the conditions precedent to coverage ("... bodily injuries caused by accident ...") existed, the Court must determine if the evidence was sufficient to establish an event of coverage ("... directly and independently ..." and not excluded) wholly as of September 9. The Court should not have proceeded to the further question of whether the event of coverage led, after a year's time, to the subsequent loss insured against (total disability) without making the necessary prior determination. Appellant submits that such prior determination would have found the evidence of pre-existing infirmities and disease was uncontradicted. The injury to the cervical spine, after the first acute period immediately following the accident had passed, was wholly due to the pressure on

the cervical nerve caused by a decrease in the nerve root space caused by an old, hard, protruding cervical disc and the rather markedly osteophyte growth on the vertabrae, which disc and osteophyte were uncontradictedly almost entirely in existence prior to September 9, and only aggravated by the accident. The Court should also have considered in this preliminary determination that the cervical operation proceeded by increasing the space for the nerve, not by correcting anything caused by the accident, but by removing lamina so the old disc would not impinge on the nerve, and that the evidence was uncontradicted that the accident did not create any new condition in the neck, but merely aggravated the pre-existing condition.

2. The opinion, on page 5 thereof, erroneously deals with specifications of error 13, 14 and 15, by omitting, or misconstruing, Appellant's position that, not only was Instruction No. 18 erroneous, but there was no instruction given as to whether or not, at the time of the September 9 accident, a particular reaction to the myelogram could have been foreseen, so that it would not be an intervening cause breaking the chain of causation. Further, the opinion is in error in stating that there was no applicable Idaho law cited on this point. Appellant would urge that while Instruction 18 submitted to the jury the issue of whether the myelogram was a necessary medical procedure and the issue of whether the myelogram contributed to the Appellee's disability, it omitted submitting the necessary connecting link issue of whether the results of the myelogram could reasonably have been foreseen, or were a separate effective event. In *New York Life Insurance Co. vs. Wilson, supra,* the main issue was the ". . . ex-

traordinarily violent coughing . . . of the insured resulting unforeseeably from the routine administration of opiates . . ." (178 F.2d at 534), wherein this Court held such unforeseeable event was an accident in and of itself. It was the sole proximate cause, the active agent of an embolism being deemed to have been caused by the violent coughing and not a pre-existing condition. The *Wilson* case was subsequent to *Rauert vs. Loyalty Protective Insurance Company, supra* (also cited), wherein an operation followed an accidentally created hernia, after which strangulation of the bowel occurred due to a pre-existing infirmity and death from infection resulted. The instructions in that case required the loss to come from the original hernia accident, including the subsequent septicemia, ". . . without the intervention of any other independent force, . . ." (106 P.2d at 1016), and the case went off on the point that the policy only excepted disease, and did not except infirmity which was deemed the cause of the strangulation. Because the evidence is uncontradicted that the disability the Appellee now suffers arose after the September 9 accident from ". . . subsequent events in the course of his treatment which were untoward and unforeseen" (Dr. Burton, Tr. 125, lines 24-25), the opinion as stated erroneously deals with the specifications of error cited and fails to consider the Idaho law that an intervening, superseding cause is one which is ". . . unforeseen, unanticipated and not a probable consequence of the original negligence . . ." *Dewey vs. Keller*, 86 Idaho 506, 388 P.2d 996 (1964).

3. The opinion should be revised on the basis of the following facts which are material and substantive to

the matter, and which Appellant believes the Court has erroneously either omitted, misstated or misconstrued:

(a) The review of the evidence on page 5 of the opinion includes a statement of fact which is not supported in the record in any way. That is, that the ". . . disabling pains . . .", which could only refer to the pains in the lower extremities, resulted ". . . either from the September 9 fall *or* from adverse reaction . . ." to the February 21 event. It is uncontradicted in the record (Tr. references, Appellant's brief, page 11) that Appellee had no complaints concerning his lower extremities after the September 9 fall until the event of February 21. The same is admitted by Appellee's brief, pages 4 and 5. The evidence by Appellee's two doctors was that the Appellee's major disability included to some degree as contributing causes the injuries resulting from both September 9 and February 21 events, as well as pre-existing disabilities, and not that one or the other event caused the disabling pain.

(b) The opinion omits the material, uncontradicted fact that the substantial and well developed osteophyte growth and hard disc protrusion at the C-7th level existed prior to the September 9 accident (Dr. Burton, Tr. 154, lines 1-4; Dr. Kiefer, Tr. 301, lines 1-6; Dr. Shaw, Tr. 205, lines 23-25; Dr. Raaf, Tr. 270 (4), and that the osteophyte and disc protrusion were merely aggravated by the September 9 accident (Dr. Kiefer, Tr. 301, lines 7-8; Dr. Raaf, Tr. 369, lines 1-4, Tr. 373, lines 12-16; Dr. Shaw, Tr. 206, lines 3-8).

(c) The opinion omits the material, uncontradicted fact that the cervical disability was substantially cured by the operation of February 28 by removal of sufficient pre-existing osteophyte to decompress the nerve from the pre-existing hard disc protrusion (Dr. Kiefer, Tr. 297, lines 1-13), and any residual disability in the cervical spine by itself would not prevent Appellee from doing his work. (Dr. Burton, Tr. 151, lines 21-23; Dr. Shaw, Tr. 205, lines 15-18; Dr. Kiefer, Tr. 307, lines 18-20).

(d) The statement of facts on page 2 of the opinion is erroneous in stating the occurrence of February 21. The evidence was uncontradicted that the Apellee's pain arose, not with any difficulty in arising, but only after stepping out of bed onto the floor, and the opinion omits the time sequence of approximately two hours after the myelogram when the event occurred. This point is vital, in that the evidence is uncontradicted that inflammation necessary to create arachnoiditis from the dye in the myelogram could not occur in such a short time, and, together with the fact of standing up causing the pain, it leads to the alleged differential diagnosis of a cause related to the pre-existing lumbar fusion.

(e) The statement of the coverage of the policy is erroneous in that the words "against specified loss described . . ." is omitted from the opinion. Such omission is material error in that the point is essential to indicate the limited coverage of the policy and is determinative of the burden of proof as the courts have determined it between policies with general coverages containing exceptions, and policies of extremely limit-

ed coverage. In the latter, which is presently before the Court, the burden is entirely upon the plaintiff to bring himself within the coverage, which coverage is defined as avoiding the exclusions which are the limiting portions of the policy.

(f) The coverage of the policy is likewise erroneously stated on page 2 of the opinion by the omission of the words "from any one or more of the following," and by the omission of the words ". . . illness, disease . . ." . The limitation of the issue of the exclusion only to the word "bodily infirmity" is material error, because of the distinction made in the Idaho case of *Rauert vs. Loyal Protective Insurance Co., supra*, between infirmity and disease. Because the evidence is uncontradicted in this case that, among other things, the Appellee was suffering from advanced deafness, pulmonary fibrosis, chronic bronchitis, emphysema, and some asthma, as well as arteriosclerosis, which had a definite effect on his ability to do heavy work, disease was a material item of the pre-existing condition relied on by Appellant.

(g) The coverage of the policy is also erroneously stated as to the permanent disability, by the omission from the opinion that the continuous total disability must arise from such injuries commencing within one year after the date of the accident, which point is material as a proof of loss could not be submitted until after the year had run from the disability commencement. As will appear in more detail in a later point the cervical spine injury could not have created the disability under the policy, due to its intimate relationship to pre-existing disease and infirmity, and assum

ing the myelogram disability is within the coverage of the policy, one year from February 21 had not run, and the proof of loss on its face did not claim it.

WHEREFORE, It is respectfully prayed that the Court grant a rehearing in the above entitled matter.

RICHARDS, HAGA & EBERLE

By_____

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing in my judgment is well founded on the grounds set forth therein, and that the petition is not interposed for delay.

_____

Attorney For Appellant

CERTIFICATE OF MAILING

I hereby certify that on the ____ day of September, 1967, I mailed a true and correct copy of the above and foregoing Petition for Rehearing to Roberts & Poole, 111 Broadway, Boise, Idaho, Attorneys for Appellee.

_____

Attorney for Appellant